

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 3, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2677

Cir. Ct. No. 2003CF435

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK HENNING,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County:
JON M. COUNSELL, Judge. *Affirmed.*

Before Blanchard, P.J., Lundsten and Sherman, JJ.

¶1 PER CURIAM. Mark Henning appeals an order denying his motion for postconviction relief under WIS. STAT. § 974.06.¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶2 Henning was convicted of operating with a prohibited alcohol concentration, as a seventh offense, in 2006. He represented himself at trial after the court found that he had waived his right to counsel by his conduct. Henning did not file a postconviction motion or pursue an appeal under WIS. STAT. RULE 809.30. He filed the postconviction motion now before us in 2009. The circuit court denied that motion in 2010. On appeal, we reversed, granting the State's motion for a remand to circuit court for an evidentiary hearing to develop a record on Henning's claim that he did not waive or forfeit his right to counsel. On remand, the court held a hearing, determined again that Henning forfeited his right to counsel, and denied the motion. Henning now appeals.

¶3 A defendant may forfeit his right to counsel by his actions. *State v. Cummings*, 199 Wis. 2d 721, 756-57, 546 N.W.2d 406 (1996). Forfeiture occurs if the defendant intentionally frustrates the orderly and efficient progress of the trial by manipulation of the right to counsel. *State v. Coleman*, 2002 WI App 100, ¶¶17-18, 253 Wis. 2d 693, 644 N.W.2d 283. Henning argues that the circuit court erred by again concluding that he forfeited his right to counsel. We reject this argument for two reasons.

¶4 First, we conclude that this issue cannot properly be raised in Henning's motion under WIS. STAT. § 974.06. The circuit court clearly determined before trial that Henning had, by his conduct, waived his right to an attorney, and the court described that conduct. If the record or the court's analysis was inadequate to support that finding, Henning had an opportunity to contest it by pursuing direct review under WIS. STAT. RULE 809.30. Because the issue was one previously decided, Henning was not required to file a postconviction motion before appeal, but could have raised the issue directly by appealing the judgment of conviction. *See* WIS. STAT. § 974.02(2). However, instead of pursuing review

under RULE 809.30, Henning discharged his postconviction attorney, and his right to seek review under that rule eventually expired when we denied his eighth pro se motion to extend that time, more than a year after the original deadline.

¶5 Henning's current motion under WIS. STAT. § 974.06, by asking the circuit court to rule again on forfeiture, is attempting to relitigate an issue that was already decided by that court before trial. Motions under that section may not be used to relitigate issues previously litigated. *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Although the State, in the earlier appeal, moved for a remand to further address forfeiture of counsel, we are not bound by the State's implied concession that review under § 974.06 is appropriate. Accordingly, on closer inspection, we now recognize that this issue is not properly before us under § 974.06.

¶6 We also affirm the order denying the postconviction motion on the merits. Henning has not persuaded us that the court erred in its postconviction determination of forfeiture.

¶7 Henning may also be arguing on appeal that the court erroneously denied his suppression motions before trial. As with forfeiture of counsel, this was an issue already decided by the circuit court that Henning could have raised on direct review under WIS. STAT. RULE 809.30. An appeal from the judgment of conviction would have brought the suppression issue before us, but this is not an appeal from that judgment and, as above, the suppression issue cannot be relitigated by using WIS. STAT. § 974.06.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

